Asylum Policy: Religious Persecution

Presented by

Ken Starr, Kimberlee Colby, & Thomas Farr

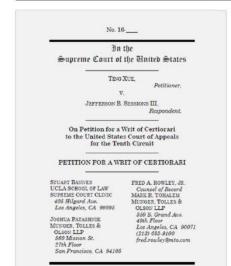
Ting Xue v. Sessions

> Los Angeles, CA 90071 (213) 683-9100

OSHUA PATASHNIE MUNGER, TOLLES & OLSON LLP 560 Mission St. 27th Floor San Francisco, CA 94105

- For attending an unregistered house church, Xue was
 - arrested
 - beaten
 - jailed for three days and four nights
 - · forced to pay a major fine
 - required to take reeducation classes, and
 - · warned not to attend illegal church meetings.
- The IJ credited his testimony but denied his asylum petition, saying his fears of future persecution "do[] not amount to more than a restriction on [his] liberty and thus do[] not rise to the level of persecution."
- The BIA affirmed.

Ting Xue v. Sessions



- The Tenth Circuit held that the "level of harassment" Xue experienced – "ordered, under threat of penalty, to stop practicing his religion" – was not "persecution" under 8 U.S.C. § 1101(a)(42)(A).
- Xue petitioned for certiorari in the U.S.
 Supreme Court, but his case settled.

The Key Issue



- The meaning of the phrase "well-founded fear of persecution" "on account of" "religion."
 8 U.S.C. § 1101(a)(42)(A).
- The INA's text refers to
 - "persecution," not to "severe persecution"
 - "religion," not "religious belief"
- Persecution on account of "religion" entails communal and public religious exercise, not simply "religious belief."

The Majority View

Muhur v. Ashcroft, 355 F.3d 958 (7th Cir. 2004)

"One aim of persecuting religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining populations."

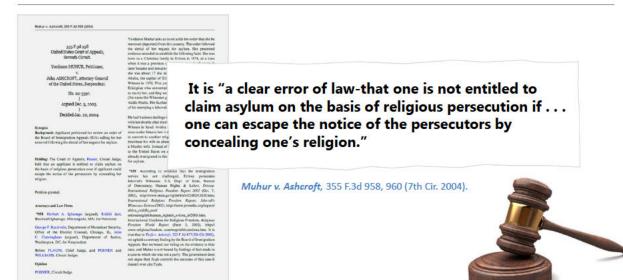
Zhang v. Ashcroft, 388 F.3d 713 (9th Cir. 2004) (per curiam)

"to require [a Falon Gong petitioner] to practice his beliefs in secret" to "avoid persecution" is contrary to our basic principles of religious freedom and the protection of religious refugees."

Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341 (11th Cir. 2009)

"having to practice religion underground to avoid punishment is itself a form of persecution."

Concealing Religion to Avoid Persecution is still Religious Persecution



Pre-Constantine Rome Confirms this Principle

203 F.3d rojd
United States Court of Appeals,
Seventh Circuit.

Verdanos PAURUX, Pristioner,
John ASSICHOUT, Attempt General
of the United States, Respondent.
No. 00-3390.

Appead Dec. 3, 00-05.

Decided dan. 20, 00-04.

Budground: Applicant politioned for review an order of the Board of Immigration Appeals (BIA) calling for her removal following the desait of her request for asylum.

Bidding: The Court of Appeals, Power, Clocalt Judge, held that an applicant is entitled to claim asplan on the hads of religious personation even if applicant could escape the notion of the persocution by concealing for religion.

Petition granted.

Attorneys and Law Firms

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Washington, DC, for Respondent.

Before PLAUM, Chief Judge, and POSNER as WILLEAMS, Givent helps.

Codeline

POSNER, Circuit Judge

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"Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn't follow that Rome did not persecute Christians, or that a Christian who failed to conceal his faith would be acting 'unreasonably."

Muhur, 355 F.3d at 960 (emphasis added).



Pre-Constantine Rome Confirms this Principle

355 F.ad 950 United States Court of Appeals, Sevents Circuit.

Yordanos MUHUR, Petitiones,
John ASHCROFT, Attorney General
of the United States, Respondent.
No. 00-3591.

Sympals Background Applicant positioned for review as order of the Board of Remigration Appeals (BIA) calling for ber

Holding: The Court of Appeals, Pooser, Circair, Judg beld, that an applicant is entitled to claim stylen o the basis of religious persocution even if applicant coasecupe the notice of the persocution by concealing is religion.

Petition granted.

Attorneys and Law Firms

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Before PLAUM, Chief Judge, and POSNER and WILLIAMS, Circuit hedge.

POSNER, Circuit Judge

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"One aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population."

Muhur, 355 F.3d at 961.

 The same rationale that drove pre-Constantine Rome undergirds China's policy towards Christianity and Falun Gong and is pervasive worldwide.





The First Amendment and the Free Exercise of Religion

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

U.S. Const., Amend. 1

RFRA and RLUIPA Interpretation of Religious Exercise

"The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

42. U.S.C. § 2000cc-5 (2012)

 Both statutes require sincerity—thus, sham claims must be weeded out at the outset.

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DOJ AG Memo Guidance on Religious Freedom (October 6, 2017)



Office of the Attorney General Washington, B. €. 20530

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENTS AND AGENCES
FROM: THE ATTORNEY GENERAL
SUBJECT: Federal Law Provessions for emission Library

Religious liberty is a foundational principle of enduring importance in America, embrined in our Commission and other sources of forbers law. As James Madison explained in his Memorial and Remonstrators Against Britgious Assessments, the five curvives of brilgion's in in sauces as and formation of the contract of the principle of the contract of th

The freedom of religion is a fundamental right of paramount importance, expenses to follow the following the control to follow the control to follow the following the control to follow the control to follow

Religious liberty is embrined in the sext of our Construction and in numerous fishances, in recompanies the right of all Americans to sciencia their religion feels, without he had been assumed to the religious feels, without he had been exceptanted the right of all Americans to expens their religious beliefs, slighten to the narrow kinni that apply to all forms of speech, in the United States, the free custrain of risk of a more public perference to be undead against ether policy perferences.

James Madison, Memorial and Remonstrator Against Religious Assessment (June 29, 1785), in 5 THCFO/ CONSTRUCTOR 82 (Philip B. Kustano & Ralph Lenter eds., 1987).

"The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs."

Mem. at 2 (relying on RFRA).

Directing all Departments to "vigorously enforce Federal law's robust protections for religious freedom."

Mem. at 1 (quoting Exec. Order 13798, the Presidential Executive Order Promoting Free Speech and Religious Liberty).

International Religious Freedom Act of 1998

One Hundred fifth Congress of the United States of America

AT THE SECOND SESSION

Began and hid at the City of Vashington on Tuesday, seventh day of Jonnary, one thousand nine hundred and ninety-eight

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to superior. United Planter durings golicy with respect to, and to flates solveney on behalf of, individually persecuted in brings: of religion, in auditorial briade flates action in response to V freedom in ferrigo constrict; to evolvidide has almost and a following Proclems, within the Department of Planta, a Consider Fringtone Proclem, and a lightest Advisor on International within the National Security Content, and the other actions within the National Security Content, and the other purposes.

Be it exacted by the Secale and House of Representation of the United States of America in Congress assembled, SECTION ISSIGN THER TABLE OF CONTENTS.

(a) SECRY TITLE—This let may be cited as the "international Religious Products Act of 160%".

(b) TABLE OF CONTENTS—The table of contents for this Act is as follows.

TITLE I-DEPARTMENT OF STATE ACTIVITIES

Sec. 191. Office on International Soligious Previous: kashassadar at Larg Sec. (Sol. 1918). The Commissional Soligious Previous.

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"Even more abhorrent, religious believers in many countries face [] severe and violent forms of religious persecution In many countries, religious believers are forced to meet secretly, and religious leaders are targeted by national security forces and hostile mobs."

22 U.S.C. § 6401(a)(5) (emphasis added).

"The term 'violations of religious freedom' means violations of the internationally recognized right to freedom of religion and religious belief and practice," "including ... (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (ii) speaking freely about one's religious beliefs."

22 U.S.C. § 6402(16).

International Norms Reject the Distinction between Belief and Practice

The United
 Nations has long
 accepted the
 principle that
 religious beliefs
 are not separate
 from religious
 practice.



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International Norms Reject the Distinction between Belief and Practice



UNITED NATIONS

• Universal Declaration of Human Rights, art. 18 (1948):

"Everyone has the right to freedom of ... religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

14

World of Faith and Freedom



 Advancing religious freedom successfully in our foreign policy can help victims of religious persecution abroad and increase the security of the American people.

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